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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

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**JAN 17 1997**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Amendment of Section 73.202(b), )

Table of Allotments )

FM Broadcast Stations )

Milledgeville and Covington, GA )

MM Docket \_\_\_\_\_

RM \_\_\_\_\_

Directed to: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**REPLY TO JOINT OPPOSITION TO**  
**PETITION FOR RULE MAKING**

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January 17, 1997

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**REPLY TO JOINT OPPOSITION TO  
PETITION FOR RULE MAKING**

Scotts Trail Radio, Inc., by its attorneys, hereby replies to the Joint Opposition filed January 7, 1997, by Sapphire Broadcasting, Inc., and WNNX License Investment Company (jointly "WHMA") to Scotts Trail's December 23, 1996, Petition for Rule making, which proposed reallocation of Channel 264A from Milledgeville, Georgia, to Covington, Georgia, and its upgrade to Channel 264C3.

1. WHMA does not argue that the Scotts Trail petition is technically deficient. It argues, instead, that the proposal in Docket No. 89-585 for allotment of Channel 263C1 to Sandy Springs, Georgia, is a bar to Scotts Trail (as Scotts Trail expressly recognized) and that the pending application for review in Docket No. 89-585 should not be dismissed and the

docket terminated, as requested by Scotts Trail. Scotts Trail has answered that WHMA argument in the attached "Reply to Joint Opposition to Motion to Dismiss and Terminate", which is incorporated herein by this reference.

2. WHMA also pleads in its lengthy footnote 6 that the prior grant to WLRR of an upgrade to Channel 264C3 (at Milledgeville) should for some reason weigh against Scotts Trail's petition for the allotment of Channel 264C3 to Covington, Georgia, as Covington's second broadcast outlet. WHMA cites no rule, case, or policy support for these feelings it expresses. It is, however, apparent that there is an inescapable flaw in WHMA's emotional effort to compare Scotts Trail's proposed allotment of Channel 264C3 to Covington with its motion to dismiss WHMA's application for review. Allotment of Channel 264C3 to Covington complies with Section 73.208(a); WHMA's application for review seeks an allotment which does not.

WHEREFORE, WHMA's Joint Opposition to Scotts Trail's Petition for Rule Making should be denied.

Respectfully submitted,

SCOTTS TRAIL RADIO, INC.

By: 

James P. Riley  
Ann Bavender

Its Attorneys

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| In the Matter of                     | ) |                      |
|                                      | ) |                      |
| Amendment of Section 73.202(b),      | ) | MM Docket No. 89-585 |
| Table of Allotments                  | ) | RM-7035              |
| FM Broadcast Stations.               | ) | RM-7320              |
| (Eatonton and Sandy Springs,         | ) |                      |
| Georgia; and Anniston and Lineville, | ) |                      |
| Alabama)                             | ) |                      |

To: The Commission

**REPLY TO JOINT OPPOSITION TO**  
**MOTION TO DISMISS AND TERMINATE**

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| Georgia; and Anniston and Lineville, | ) |                      |
| Alabama)                             | ) |                      |

Directed to: The Commission

**REPLY TO JOINT OPPOSITION TO  
MOTION TO DISMISS AND TERMINATE**

Scotts Trail Radio, Inc., by its attorneys, hereby replies to the "Joint Opposition to Motion to Dismiss Application for Review and to Terminate Proceeding" filed January 7, 1997, by Sapphire Broadcasting, Inc., and WNNX License Investment Company.

1. The Joint Opponents (jointly "WHMA") make a simple but unmeritorious and unavailing argument. WHMA argues that it was unnecessary for WSSL, the Gray Court, South Carolina, station which must downgrade and relocate to permit the Sandy Springs allotment, to file for and obtain a construction permit. Instead, the Joint Opposition says, WSSL might have shown its consent to the downgrade in a statement filed with WHMA's 1990 counterproposal of the Sandy Springs allotment. WHMA argues that the WSSL application for a permit was a substitute for a consent statement, and was not a prerequisite (if a consent statement had been filed) to the Sandy Springs proposal.

2. Scotts Trail did not argue the contrary (despite the assertion in par. 5 of the Joint Opposition) because the issue is not presented in this proceeding. WSSL did not provide a consent statement for inclusion in this docket. For whatever reason, WSSL proceeded by the filing of a permit application to provide, contingently, the mileage separation relief needed for the 1990 counterproposal of the Sandy Springs allotment. The permit was granted, expired, reinstated and finally canceled and deleted from the FCC's engineering database.

3. WHMA says, at par. 5, that nowhere does Scotts Trail point to a statement "in this docket proceeding where WSSL says it is no longer willing to downgrade its facility." Although accurate, the observation is pointless.<sup>1</sup> Moreover, WHMA has provided its own statement of WSSL's unwillingness. WHMA's Joint Opposition shows expressly that on January 7, when it was filed, and perhaps for the three preceding years (since its permit was deleted), WSSL has not consented to its downgrade. WHMA's footnote 7, page 5, says in pertinent part:

WHMA has contacted WSSL for the purpose of providing an updated statement regarding its position. At this point, WSSL will need to negotiate with the WHMA buyer before it can make a definite commitment. The negotiations may need to await FCC approval of the WHMA assignment and its consummation.

Stripped of WHMA's language chosen to take the sharp edge off the disclosure made in the footnote, this is a clear admission that there was not consent by WSSL on January 7, and

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<sup>1</sup>There has never been a statement in this docket proceeding where WSSL has said it is willing to downgrade its facility.

during some preceding time, to a downgrade. As Scotts Tail claimed in its Motion to Dismiss and Terminate, the Sandy Springs allotment of Channel 263C1 is in violation of Section 73.208(a) because it is short of the required separation to the authorized transmitter site of WSSL, and does not satisfy the Mass Media Bureau's policy of accepting rulemaking proposals which are contingent on a pending permit application or implementation of an outstanding permit, nor does it satisfy the alternative policy of accepting proposals accompanied by a statement of consent to a necessary relocation or downgrade.

4. WHMA asks in footnote 7 that the Commission not act "precipitously" on Scotts Trail's Motion. In truth, it would not be precipitous to grant the Motion today. It would, instead, be the required response to a situation in which a rulemaking proposal which may at one time have been acceptable has become, by the proponent's own admission, unacceptable. WHMA today does not differ from a petitioner who filed a counterproposal on January 7, 1997, and showed that, but for one pesky short-spacing, his proposed allotment complied with Section 73.208(a). As to that one trouble spot, the petitioner asserts that negotiation with the licensee of the station to which he would be short-spaced will be necessary before that licensee would commit to whatever change is needed to eliminate the short-spacing. This petitioner-counterproponent asks the Commission to hold his place in the proceeding while he attempts to negotiate. There is no rule or policy under which the Commission's Mass Media Bureau would grant such a request.<sup>2</sup>

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<sup>2</sup>Despite the aphorism "everything [or everyone] has its [or his/her] price", it is common experience that negotiations are frequently protracted (e.g., baseball labor) and frequently unproductive (e.g., baseball in Washington).



5. Put another way, the test of the technical viability of an allotment rulemaking petition must be that it is continuously implementable if granted, based upon the record (consents, show cause orders, permit applications and grants) before the Commission. When that record does not show that the allotment could be implemented if granted, the petition must be dismissed. The Commission has accepted rulemakings based upon the happening of a certain category of technical contingencies (i.e., grant of pending construction permit applications; the implementation of those permits) necessary to implementation of the proposed allotment, but has not accepted petitions based upon the twice-removed contingent event of successfully negotiating with a licensee a contract under which that licensee would commit to filing an application which, only if granted and implemented, would allow the rulemaking proposal to be implemented. That, however, is just what WHMA is asking of the Commission.<sup>3</sup>

6. WHMA seems to suggest, in pars. 3 and 6 of the Joint Opposition, that because WSSL said in Form 307 applications<sup>4</sup> requesting reinstatement of the expired WSSL downgrade permit that implementation of the WSSL construction permit is dependent upon the outcome in MM Docket No. 89-585, WSSL's continuing consent to a downgrade should

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<sup>3</sup>WHMA's Joint Opposition is, as it acknowledges, devoid of a consent by WSSL. It does contain the explicit admission in footnote 7 that WHMA has no contractual right to the consent of WSSL. There are several representations in WHMA's Joint Opposition about the actions and motivations of WSSL which are not supported by a declaration of WSSL. Those representations (e.g., "WSSL simply got tired of incurring legal fees ....", p. 5) need not be weighed for accuracy, because they are irrelevant to resolution of Scotts Trail's Motion in light of the lack of consent by WSSL on January 7.

<sup>4</sup>See, e.g., BMPH-930607JC, the last such application.

be inferred. More logically, Scotts Trail suggests, the absence of any effort by WSSL after June 6, 1993, to extend or reinstate the downgrade permit would support the inference that any contractual obligation of WSSL to downgrade had terminated.<sup>5</sup> But two things are more important than choosing between these competing inferences: first, the Commission could not reasonably conduct its complex and sometimes contentious allocations process on the basis of choosing among alternative inferences; second, footnote 7 of the Joint Opposition makes explicit what Scotts Trail believed was the more compelling inference--WSSL is not obligated to downgrade and is not now consenting to do so.

7. It would be contrary to the FM allocation rules and rulings of the Commission, and obviously injurious to and a denial of the rights of Scotts Trail, to prolong the Sandy Springs rulemaking proceeding. Docket No. 89-585 has blocked the FM allocations process throughout the southeast for channels proximate to Anniston's Channel 263C, despite the fact that the proposal in Docket No. 89-585 has not been viable for an unknown number of years. Docket No. 89-585 is alive today only because WHMA has failed to place in this proceeding notice to the Commission that WSSL has no construction permit and is not prosecuting an application to reinstate a permit, and that WHMA has no contractual right to the consent of WSSL to a downgrade of its allotment and a change of the WSSL site. This lack of forthright notice to the Commission by WHMA cannot be rewarded by maintaining Docket No. 89-585

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<sup>5</sup>That there was a contract at one time seems likely. In the Engineering Statement supporting Emerald Broadcasting's 1990 counterproposal, it is represented that "Petitioner has obtained an agreement with WSSL-FM to move the WSSL-FM site and operate as a Class C1 facility." (Figure 1 of Emerald's Engineering Statement at Sheet 2, n.3.) Both the downgrade and the site move were necessary.

as a closed and viable proceeding while WHMA seeks to negotiate with WSSL. Even were WHMA to soon reach agreement with WSSL, that event could not overcome the fact that this proceeding became untenable sometime prior to January 7, 1997.

8. Termination of this proceeding and dismissal of WHMA's application for review will not in itself deprive WHMA of the opportunity to propose the allotment of Channel 263 to Sandy Springs if it chooses to do so and if it can reach agreement with WSSL. WHMA would then have the opportunity to file its proposed reallocation as a counterproposal to Scotts Trail's December 23, 1996, petition for rulemaking to reallocate Channel 264. There is no basis in law for according WHMA a greater right than this, and no basis for denying Scotts Trail the right to have its petition for rulemaking fully and fairly considered as the predicate for a Notice of Proposed Rulemaking without being barred by an untenable proposal in a moot docket.

WHEREFORE, the Commission should grant Scotts Trail's Motion and dismiss as moot the pending application for review and terminate the proceeding.

Respectfully submitted,

SCOTTS TRAIL RADIO, INC.

By: 

James P. Riley  
Ann Bavender

Its Attorneys

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January 17, 1997

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Reply to Joint Opposition to Petition for Rule Making" were sent this 17th day of January, 1997, by first class United States mail, postage prepaid, to the following:

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